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4 UNITED STATES DISTRICT COURT
5 WESTERN DISTRICT OF WASHINGTON
6 AT TACOMA

7 DOUGLAS VERDIER and ANDREW
8 LONG,

9 Plaintiffs,

10 v.

11 GREG BOST and LAURIE BOST,

12 Defendants.

CASE NO. C18-5043 BHS

ORDER GRANTING
DEFENDANTS' MOTION FOR
SUMMARY JUDGMENT,
DENYING PLAINTIFFS' MOTION
FOR SUMMARY JUDGMENT
AND MOTION FOR EXTENSION
OF TIME AS MOOT, AND
DECLINING TO EXERCISE
SUPPLEMENTAL JURISDICTION

13 This matter comes before the Court on Defendants Greg and Laurie Bost's
14 ("Bosts") motion for summary judgment, Dkt. 47, Plaintiffs Andrew Long ("Long") and
15 Douglas Verdier's ("Verdier") (collectively "Plaintiffs") motion for partial summary
16 judgment, Dkt. 52, and Plaintiffs' motion for extension of time, Dkt. 64. The Court has
17 considered the pleadings filed in support of and in opposition to the motion and the
18 remainder of the file and hereby grants the Bosts' motion and denies Plaintiffs' motions
19 for the reasons stated herein.

20 **I. PROCEDURAL HISTORY**

21 On January 19, 2018, Plaintiffs filed a complaint against the Bosts asserting three
22 causes of action as follows: (1) a violation of the Clean Water Act, 33 U.S.C. § 1251, *et*

1 *seq.* (“CWA”) for filling without a permit, (2) a violation of the CWA for an ongoing
2 discharge, and (3) a violation of state water management statutes and other torts. Dkt. 1.

3 On July 9, 2018, Defendants filed a motion to dismiss. Dkt. 16. On September
4 11, 2018, the Court granted the motion in part, denied the motion in part, and granted
5 Plaintiffs leave to amend the complaint. Dkt. 23. The Court dismissed Plaintiffs’ first
6 claim and granted Plaintiffs leave to amend. *Id.* Plaintiffs failed to file an amended
7 complaint.

8 On February 27, 2019, the Bosts filed a motion for summary judgment on
9 Plaintiffs’ remaining claims, Dkt. 47, and Plaintiffs filed a motion for partial summary
10 judgment, Dkt. 52. On March 13, 2019, Plaintiffs responded and moved to strike the
11 Bosts’ “undisclosed experts.”¹ Dkt. 53. On March 18, 2019, the Bosts responded. Dkt.
12 54. On March 22, 2019, Defendants replied. Dkt. 62. On March 25, 2019, Plaintiffs
13 filed a motion for extension of time to file their reply and filed the reply. Dkts. 64, 65.
14 On March 26, 2019, the Bosts responded to Plaintiffs’ motion for an extension of time.
15 Dkt. 67.

16 **II. FACTUAL BACKGROUND**

17 This is the latest legal dispute involving Verdier and his neighbors the Bosts. *See*,
18 *e.g.*, *Verdier v. Clark Cty.*, C15-5700RBL, 2017 WL 2180753, at *1 (W.D. Wash. May
19 18, 2017), *aff’d sub nom. Verdier v. Walker*, 745 Fed. Appx. 781 (9th Cir. 2018)
20 (dismissing civil rights claims based on detention after “Verdier turned off the Bosts’

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22 ¹ Although it is debatable whether the government officials are experts that should have been disclosed, the motion is moot because the Court resolves this matter without relying on their declarations.

1 water supply [and] threatened to ‘blow away’ his neighbor”); *Verdier v. Bost*, 192 Wn.
2 App. 1066 (2016) (“the Verdiers sued the Bosts to quiet title to the disputed land and
3 [for] damages for the maintenance and use of the [shared] well.”). In this case, Verdier
4 and Long, “an environmental law scholar,” Dkt. 1, ¶ 4, bring this citizen suit for alleged
5 violations of environmental protection laws. Although Plaintiffs move to strike some of
6 the Bosts’ evidence, the relevant facts are mostly undisputed.

7 In 2004, the Bosts purchased their property in Washougal, Washington. Dkt. 48,
8 Declaration of Greg Bost, ¶ 1. The house was built in the 1920s, and the Bosts assert the
9 stone retaining walls were originally built at the same time. *Id.*, ¶ 2. One wall is near the
10 property line that the Bosts share with Verdier. *Id.* In 2012, the Bosts discovered that the
11 wall near the property line was in need of repair. *Id.*, ¶ 3. The Bosts hired a repairman to
12 repack the stones in the wall with mortar. *Id.* Mr. Bost declares that the repairs did not
13 modify the size or location of the wall. *Id.*

14 In 2016, a Clark County Code enforcement officer visited the Bosts’ property in
15 response to a complaint from Verdier. Dkt. 51-1 at 1. The officer reported as follows:

16 MET WITH THE PROPERTY OWNERS (BOST’S) ON SITE TO VIEW
17 THEIR PROPERTY. THE ONLY RETAINING WALL ON SITE IS
18 MADE OF STONE AND DOWN BY THE RIVER. ITS 4’ OR LESS
19 AND HAS BEEN HERE A LONG TIME. NO SIGN OF ANYTHING
20 RECENT BEING BUILT DOWN HERE. NO SIGN OF ANY
21 VIOLATION.

19 *Id.* at 2.

20 In October 2018, Rebecca Rothwell, a wetlands and shorelands specialist for the
21 Washington Department of Ecology (“DOE”), and James Carsner, biologist and project
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1 manager for the United States Army Corps of Engineers (“Corps”), visited the Bosts’
2 property. Dkt. 49, ¶¶ 3, 4. They concluded that the Bosts’ retaining wall was located
3 above the Washougal River’s ordinary high water mark (“OHWM”) and that the Bosts’
4 repairs to the wall did not require authorization from the DOE or from the Corps. *Id.*

5 In January 2019, the Bosts arranged for a second visit by Ms. Rothwell and Mr.
6 Carsner. *Id.* ¶ 5. Ms. Rothwell located the OHWM, in consultation with Mr. Carsner,
7 who concurred with the location. *Id.* The location was surveyed the same day by Daniel
8 Renton, who produced an exhibit drawing illustrating the location of the OHWM in
9 relation to the stone retaining walls. Dkt. 50-2 at 1 (“Renton Drawing”). Although the
10 OHWM is at or near the toe of some of the retaining walls on the Bosts’ property, it does
11 not touch the retaining wall in the southwest corner, and it lies well below the fence. *Id.*

12 **III. DISCUSSION**

13 **A. Summary Judgment**

14 **1. Standard**

15 Summary judgment is proper only if the pleadings, the discovery and disclosure
16 materials on file, and any affidavits show that there is no genuine issue as to any material
17 fact and that the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c).
18 The moving party is entitled to judgment as a matter of law when the nonmoving party
19 fails to make a sufficient showing on an essential element of a claim in the case on which
20 the nonmoving party has the burden of proof. *Celotex Corp. v. Catrett*, 477 U.S. 317,
21 323 (1986). There is no genuine issue of fact for trial where the record, taken as a whole,
22 could not lead a rational trier of fact to find for the nonmoving party. *Matsushita Elec.*

1 *Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986) (nonmoving party must
2 present specific, significant probative evidence, not simply “some metaphysical doubt”).
3 *See also* Fed. R. Civ. P. 56(e). Conversely, a genuine dispute over a material fact exists
4 if there is sufficient evidence supporting the claimed factual dispute, requiring a judge or
5 jury to resolve the differing versions of the truth. *Anderson v. Liberty Lobby, Inc.*, 477
6 U.S. 242, 253 (1986); *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass’n*, 809 F.2d
7 626, 630 (9th Cir. 1987).

8 The determination of the existence of a material fact is often a close question. The
9 Court must consider the substantive evidentiary burden that the nonmoving party must
10 meet at trial—e.g., a preponderance of the evidence in most civil cases. *Anderson*, 477
11 U.S. at 254; *T.W. Elec. Serv., Inc.*, 809 F.2d at 630. The Court must resolve any factual
12 issues of controversy in favor of the nonmoving party only when the facts specifically
13 attested by that party contradict facts specifically attested by the moving party. The
14 nonmoving party may not merely state that it will discredit the moving party’s evidence
15 at trial, in the hopes that evidence can be developed at trial to support the claim. *T.W.*
16 *Elec. Serv., Inc.*, 809 F.2d at 630 (relying on *Anderson*, 477 U.S. at 255). Conclusory,
17 nonspecific statements in affidavits are not sufficient, and missing facts will not be
18 presumed. *Lujan v. Nat’l Wildlife Fed’n*, 497 U.S. 871, 888–89 (1990).

19 **2. CWA**

20 The Bosts move for summary judgment on Plaintiffs’ CWA claim for an ongoing
21 discharge. The Bosts advance three arguments as follows: (1) all repairs were completed
22 above the OHWM, which is beyond the reach of the CWA; (2) the repairs are exempt

1 from the CWA because it was a repair to a currently serviceable structure; and (3)
2 Plaintiffs have failed to submit evidence of an ongoing discharge. In their reply, the
3 Bosts’ appear to abandon the first two arguments and rely exclusively on the third.²
4 Thus, the Court will address the evidence of any ongoing discharge.

5 The CWA does not permit citizen-suits for violations “wholly past,” instead
6 requiring plaintiffs to show that a defendant is “in violation” of the CWA at the time the
7 lawsuit is filed. *See Gwaltney of Smithfield, Ltd., v. Chesapeake Bay Found., Inc.*, 484
8 U.S. 49, 59 (1987) (“the harm sought to be addressed by the citizen suit lies in the present
9 or the future, not in the past.”). In denying the Bosts’ motion to dismiss Plaintiffs’
10 ongoing discharge claim, the Court relied on Plaintiffs’ allegation that “the ongoing
11 discharge of concrete and other retaining-wall material into the Washougal River without
12 a permit is a present and unlawful discharge of pollutants under the CWA.” Dkt. 23 at 7.
13 On summary judgment, Plaintiffs may not rely solely on allegations. *Lujan*, 497 U.S. at
14 888–89. The Bosts argue that Plaintiffs have failed to submit any evidence of any
15 ongoing discharge beyond mere speculation. Dkt. 62. The Court agrees. Plaintiffs
16 request that the Court presume that the Bosts’ repairs to the wall “completed with an
17 assortment of readily available fill material that common sense dictates will create an
18 ongoing or intermittent stream of pollutants into the river.” Dkt. 53 at 18. This,
19 however, is mere speculation which may not defeat summary judgment. Therefore, the
20 Court grants the Bosts’ motion on Plaintiffs’ remaining CWA claim because Plaintiffs

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22 ² Even if the Bosts did not explicitly abandon these arguments, the third issue is dispositive as a
matter of law.

1 have failed to submit any evidence on an ongoing violation sufficient to create material
2 questions of fact for trial.

3 **B. Supplemental Jurisdiction**

4 When a district court has dismissed all claims over which it has original
5 jurisdiction, it “may decline to exercise supplemental jurisdiction” over the remaining
6 state law claims. 28 U.S.C. § 1367(c). The Bosts request that the Court decline to
7 exercise jurisdiction over Plaintiffs’ remaining state law claims, and Plaintiffs failed to
8 respond to this argument. The Court finds that Plaintiffs’ state law claims are best suited
9 for state court and declines to exercise supplemental jurisdiction. Therefore, the Court
10 dismisses the claims without prejudice.

11 **IV. ORDER**

12 Therefore, it is hereby **ORDERED** that Bosts’ motion for summary judgment,
13 Dkt. 47, is **GRANTED** and Plaintiffs’ motion for summary judgment and motion for an
14 extension of time are **DENIED as moot**. Plaintiffs’ CWA claim is dismissed with
15 prejudice and state law claims are dismissed without prejudice.

16 The Clerk shall enter a **JUDGMENT** and close the case.

17 Dated this 25th day of April, 2019.

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20 BENJAMIN H. SETTLE
21 United States District Judge
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